



Agenda Date: 9/22/04
Agenda Item: 6C

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

RELIABILITY & SECURITY

IN RE PETITION CONCERNING THE
APPLICABILITY OF THE ONE CALL DAMAGE
PREVENTION SYSTEM TO THE NEW JERSEY
PROPANE GAS INDUSTRY

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DECISION AND ORDER

DOCKET NO. GO02100732

(SERVICE LIST ATTACHED)

BY THE BOARD:

On October 3, 2002, the New Jersey Propane Gas Association ("Association") filed a verified petition for a declaratory ruling with the New Jersey Board of Public Utilities ("Board"). According to the petition, the Association is a non-profit organization representing retail propane companies in the State and is comprised of over 111 members. The Association's petition consisted of three counts. In Counts I and II, the Association requested a Board declaration that the One Call Damage Prevention System ("One Call" or "System"), established pursuant to the Underground Facility Protection Act ("UFPA"), N.J.S.A. 48:2-73 et seq., will not apply to the propane industry based, respectively, on a claim that the propane industry does not fall within the UFPA's definition of "underground facility", and on purported differences between public utilities and the propane industry. In Count III the Association asserted that the Board is not correctly enforcing the One Call program because the Board is not requiring excavators to provide, and the current One Call operator to base the issuance of notices upon a "specific site location" as the Association maintains is required by statute. The Association alleged that as a result of this non-conformity with the statutory definition of "site", notifications were issued for areas far broader than the immediate vicinity of the excavation site and that this practice has been unduly burdensome for participating propane operators. The Association requested that the Board "implement measures sufficient to comply with its statutory and regulatory obligations in connection with its administration of the One Call system in order to provide operators tickets based on site specific locations" as the Association asserted is required by statute and regulation. The Association subsequently withdrew Counts I and II of the petition. By this Decision and Order, the Board considers the remaining count of the Association's petition.

Background and Procedural History

In enacting the Underground Facility Protection Act, N.J.S.A. 48:2-73 et seq., in 1994, the Legislature found and declared “that damage to underground facilities caused by excavation and the discharge of explosives poses a substantial risk to the public safety; that such damage to underground natural gas facilities poses a substantial risk to the public safety; and that the implementation of a comprehensive One-Call Damage Prevention System can substantially reduce the frequency of damage caused by these activities.” N.J.S.A. 48:2-74. Accordingly, the Legislature determined that all operators of underground facilities in the State must be required to notify the One-Call Damage Prevention System prior to excavation or demolition. *Ibid.* The Legislature designated the Board of Public Utilities as the agency charged with implementing and supervising the System. *Ibid.* Specifically, pursuant to the UFPA, all excavators must notify the System at least three business days, and not more than 10 business days, prior to commencing excavation or demolition activities and must provide it with certain information including the “specific site location.” N.J.S.A. 48:2-82(a) and (b)(4). The operator of the System is then responsible to transmit to the “appropriate operators the information received from an excavator regarding any intended excavation in areas where the operators have underground facilities.” N.J.S.A. 48:2-76(c). The operator of an underground facility must then mark its facilities which may be affected by a planned excavation or demolition in accordance with the UFPA and regulations adopted by the Board, N.J.A.C. 14:2-1.1 et seq.; N.J.S.A. 48:2-80(a)(2). If an operator does not own, operate, or control any underground facilities at the site for which he received information from the System, the operator must make a reasonable effort to so advise the person giving the notice of intent to excavate. N.J.S.A. 48:2-80(b).

At the time the UFPA was enacted, underground facility operators in New Jersey were registered in the then-existing *voluntary* system by street index. The Association’s members did not participate during this time period of voluntary membership/enrollment. Under this system, whenever there was an excavation on the street by which the facility was registered, the facility’s owner was notified. In 1999, pursuant to the UFPA and following operation of the System for an interim five year period by the Garden State Underground Plant Location Service, a non-profit corporation, the Board issued a Request for Proposals (“RFP”) to operate New Jersey’s One-Call system for five years. N.J.S.A. 48:2-77. The RFP specified that the successful applicant would have the capability to implement both a street index system and a mapping system with fixed 1/8 square mile grids, based on latitude and longitude.

The Board accepted the proposal submitted by One Call Systems, Inc., acting through its subsidiary New Jersey One Call (“NJOC”), which is the current operator of New Jersey’s One Call Damage Prevention System. When notifying underground facility operators on the basis of the 1/8 square mile grid map, NJOC issues a notice to every underground facility within the same grid as the proposed excavation (and to underground facilities in adjoining grids as appropriate). In 1999, the New Jersey Propane Association contacted Board Staff and asked for an explanation of the One-Call program in which the Association was now required to participate. Although the propane industry, as such, is regulated by the Department of Community Affairs, the New Jersey Board of Public Utilities is entrusted with the oversight of the One-Call Damage Prevention System. Staff met with members of the Association and explained the reasons for the establishment of the System. Subsequently, certain propane

companies, belonging to the New Jersey Propane Association, registered with the System. Not long after their enrollment began, the Association informed Staff that it had a problem with the number of notifications its members were receiving. A series of meetings between Staff and the Association occurred from 2000-2002, but the parties were unable to reach agreement. This culminated in the Association filing its petition for a declaratory ruling in October 2002.

The verified petition for a declaratory ruling pursuant to N.J.S.A. 52:14B-8 was filed by the Association on October 3, 2002. On March 24, 2003, NJOC filed an answer denying the allegations and submitted a brief. At the direction of the Board, the Association provided public notice of its petition, and a pre-hearing conference was held on May 16, 2003. In April and May of 2003, the following entities submitted public comment: Vernon Township Department of Public Works; the Utility and Transportation Contractors Association of New Jersey; J. Fletcher Creamer & Son, Inc.; Public Service Gas & Electric Company; the City of Newark; and the New Jersey Department of Community Affairs.

The Association submitted pre-filed testimony of Michael Merrill, the Association's Second Vice President and the Director of Safety/Training of Suburban Propane. Board Staff submitted pre-filed testimony of Barbara Bye, NJOC's Executive Director, and Michael McNamara, President of One Call Systems, Inc. Board Staff also submitted pre-filed rebuttal testimony of Mr. McNamara. The Department of Community Affairs submitted pre-filed testimony of Michael Baier, an employee of the Department of Community Affairs, Division of Codes and Standards, which regulates the propane gas industry. Evidentiary hearings were conducted on June 25, 2003, September 8, 2003 and September 9, 2003 before Commissioner Jack Alter, and the aforementioned witnesses testified and were cross-examined. Although NJOC engaged private counsel to represent it, NJOC's counsel did not participate in the hearings. The Association's counsel and a Deputy Attorney General presented evidence and testimony at the hearings and filed briefs. At the close of the testimony on September 9th, Commissioner Alter requested that the parties submit additional information to address the following issues: (1) whether the NJOC maps are the most up-to-date maps available and (2) what other states are doing.

The Association submitted a post-hearing brief on October 27, 2003; Board Staff submitted a post-hearing brief on November 20, 2003, and the Association submitted a reply brief thereafter. The Department of Community Affairs filed a letter of exception, dated January 16, 2004, stating "that portions of Mr. Baier's September 9, 2003 testimony have been inaccurately represented in the BPU's [sic] [Deputy Attorney General's] Post-Hearing Brief". Additionally, the Association was given notice on July 1, 2004, that the Board would take judicial notice of a Request For Proposals to operate the New Jersey One-Call Damage Prevention System issued on April 2, 2004 ("new RFP") and that it could submit comments thereon. By letter dated July 16, 2004, the Association submitted its comments regarding the RFP.

Discussion and Findings:

As a result of the Association's petition for a declaratory ruling and the 2003 hearings in the matter, certain anomalies with the workings of the System in relation to the propane industry were brought to the Board's attention. The Association's Petition asserts that the current notification system does not comply with the Act or the Board's regulations because it does not provide "site-specific" notifications. The Association asks the Board to implement a system that will conform to the definition of "site" in the enabling statute, specifically N.J.S.A. 48:2-75. As evidence of its assertion that the System as currently operated produces an excessive number of tickets for propane operators, the Association points out that roughly 99% of the tickets

received by three of its 111 members in 2002 were so far from conflicting with an excavation that they were able to be "office cleared" without the need for a site visit.

In addition, the Association claims that NJOC has abused its position as System Operator by setting up a second, unregulated "screening department" which enters into contracts with individual propane operators. After NJOC has issued a notice based on the grid system to a propane operator for a charge of sixty-two cents, the second screening department (for a second charge of \$1.50) determines whether a field visit is required. The Association claims that this determination is made on the basis of the same information already provided to NJOC; and that therefore NJOC should be excluding the facilities not in conflict with an excavation before it issues any notices in the first place. The Association seeks a declaratory ruling as to operation of the One-Call System in regard to propane operators having the majority of their underground facilities within specific private property boundaries. The Association asks the Board to assure that the One-Call System be implemented on a site-specific basis as applied to propane providers.

The Board HEREBY FINDS that the propane industry is required to participate in the one call damage prevention system as underground facilities owners and operators who distribute a dangerous and highly flammable gas. Public safety is of the utmost importance in our densely populated state. Yet, as a result of the Petitioner Association's request for declaratory ruling and the evidentiary hearings held at the Board of Public Utilities, the Board EMPHASIZES that the definition of "site" in the one-call statute, N.J.S.A. 48:2-75, clearly states:

"Site" means the *specific* place where excavation work is performed or to be performed and *shall* be identified by *street address* referenced to the nearest intersecting street and sub-division name, if applicable, as well as by lot and block number, if available and by kilometer or mile marker for railways. [Emphasis added].

If an underground facilities operator, such as Petitioner Association, requests site specific notification based upon street address matching, the one call vendor shall provide such street address matching (if street address information is provided by the excavator) at the initial issuance of tickets.

Street address, if applicable, is required to be used in a matching process before the issuance of "tickets" (the notice/alert given to underground facilities operators of a potential mark-out). In its secondary screening business, NJOC did employ street address to street address matching to "clear" tickets for the Association. NJOC, as the one call system vendor for the State, must employ available street address matching, by issuing tickets corresponding to the excavation "site" as defined in N.J.S.A. 48:2-75. The lack of this information resulted in an average over notification rate of 98.5 % for certain members of Petitioner Association; namely, Suburban Propane, H & H Gas and Eastern Propane. Such a rate of over notification may actually constitute a danger to public safety; for, sending out thousands of over notifications can have the effect of lessening the seriousness with which underground facilities operators heed such warnings. Those responsible for marking out their facilities, which might present a danger at or around a dig site, may become immune to any sense of danger by such over notification. Furthermore, certain small propane operators, rather than choosing to follow the statutory requirement to register and participate in the one-call system, may instead choose to risk non-participation in order to avoid economic hardship.

The Board understands the Petitioner Association's concerns. The Board has resolved the issue of site-specificity in its recent issuance of the 2004 RFP. The 2004 RFP reflects the technological advances made in the field, and has been designed in part to address the particular concerns raised by the Propane Association. The new RFP requires that the next System Operator employ street address, if applicable, as part of its notification criteria. As a

reiteration of the statutory language, this 2004 RFP includes as a requirement a matching (of street address and/or lot and block, if available) capability for installations located, like the typical propane facility, entirely within the property lines of one street address. Other new filtering criteria includes curb to curb screening and screening for the Parkway, Turnpike and Atlantic City Expressway corridor. While the new screening criteria will not always be applicable, as there may be a significant number of excavations at a location without a specific address, the new requirements should relieve propane operators, and others similarly situated, from a high volume of over notifications for sites at which they have no installations or facilities. This relief in turn will reduce the costs associated with any such over-notification. In addition, the 1/8 square mile grid has been replaced by a 1/16 square mile grid "or any other system which notifies appropriate underground facilities as mandated by the Act while minimizing the number of additional facilities notified." 2004 RFP at 1.2.2(a)(1). Furthermore, the 2004 RFP requires that the operator of the One-Call System "refer to and make use of as appropriate Best Practices, as set forth at "Best Practices", published by the Common Ground Alliance in January 2004." 2004 RFP 2.1.2 (A)(10). These improvements should significantly reduce the over notification burden for propane operators.

The Board FURTHER FINDS that NJOC (a division of One Call Systems, Inc.), through a sister organization, entered into a private contract with the Association after NJOC had entered its contract with the State as one call vendor. This diminished the incentive for NJOC (One Call Systems, Inc.) to eliminate noticing propane operators during its initial issuance of tickets (at \$0.62 per ticket) under the state contract when these tickets could be "cleared" for an extra \$1.50 per ticket under a private contract with individual propane companies. On average 98.5 % of these tickets were cleared when street address matching was employed. Street address matching, if applicable, will reduce initial over notification. Neither a vendor chosen by the Board of Public Utilities to issue tickets under the One Call Statute, nor any entity or affiliate of the vendor may engage in an adjunct business unless prior Board approval is received.

The Board also FINDS that, while the petition was brought by the New Jersey Propane Gas Association, there are propane operators in the state that have not registered with the System Operator and are not complying with the Act. These operators, although their underground facilities contain a flammable petroleum product, are not aware of excavations in the vicinity of their installations and are not marking out those installations when such excavations occur. The Board seeks full and complete participation of all underground facilities operators in the One-Call Damage Prevention System. In seeking to compel the participation of all propane operators, the Board is mindful of the role of the Department of Community Affairs ("DCA") as the primary regulator of the propane industry. Under N.J.A.C. 5:18-10.2, a business wishing to engage in the sale of propane gas in the state must obtain a license from DCA, while N.J.A.C. 5:18-10.8 requires applicants for the license to submit a statement on whether or not the business has been the subject of any order or finding of violation by any government entity.

The Board HEREBY DIRECTS Board Staff ("Staff") to contact DCA and obtain an up-to-date list of propane licensees. The Board Secretary is further directed to send a Board Secretary's

letter, return receipt requested, describing the legal obligations of operators of underground facilities; and penalties for non-compliance to all licensed propane facilities operators and to maintain records of the letters sent.

Notices of violation in the form of Administrative Orders and Notices of Administrative Penalty Assessments ("AO/NOCAPAs") shall be sent to propane licensees that have underground facilities and do not participate as mandated within 90 days of this Order.

The Board further DIRECTS Staff to pursue all available administrative remedies, including sending notices of violation and penalties in the form of administrative orders (AO/NOCAPAs) directed to all underground facilities operators who are not currently participating in the one call system as required by statute. N.J.S.A. 48:2-86 authorizes the issuance of administrative orders "whenever it appears to the board that a person has violated any provision of the [One Call] act." Such an administrative order shall specify that it will become a final agency Order if the alleged violator fails to respond within twenty days, with all the legal and financial consequences attending that result. In the interest of public safety, such AO/NOCAPA administrative orders shall be available in all instances of violation of the Underground Facilities Protection Act.

The Board HEREBY ORDERS One Call Systems, Inc, or any future operators of the one call system, shall conform to the statutory requirements of this order, including requirements of site specificity stated in N.J.S.A. 48:2-73 et seq.

DATED: 9/24/04

BOARD OF PUBLIC UTILITIES
BY:

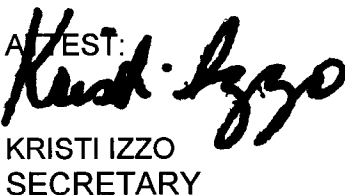

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